Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RALPH J. MAHER,

Petitioner,

v.

RETIREMENT BOARD OF QUINCY & OTHERS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

PETITION FOR WRIT OF CERTIORARI

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Dated: February 2, 2009

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QUESTIONS PRESENTED

I. Whether forfeiture of a public employee's pension constitutes a "fine" within the meaning of the Eighth Amendment's Excessive Fines Clause?

II. Whether the Massachusetts Supreme Judicial Court erred in concluding that the forfeiture of an entire pension was not excessive in this particular case when it based its decision on a state forfeiture statute that failed to provide for any proportionality between the crime committed, the harm caused, and the extent of the forfeiture, thereby wrongly treating the pension per se like "guilty property" in the context of civil *in rem* forfeitures rather than recognizing the pension forfeiture as an *in personam* criminal forfeiture?

PARTIES TO THE PROCEEDING

Pursuant to SUP. CT. R. 14.1(b), the following list identifies the parties appearing here and to the proceeding before the Massachusetts Supreme Judicial Court.

Ralph J. Maher is the Petitioner here and Appellant below.

The Retirement Board of Quincy and the Justices of the Quincy Division of the District Court Department of the Trial Court are the Respondents here and Appellees below.

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Mr. Ralph J. Maher respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Supreme Judicial Court in this case.

OPINIONS BELOW

The opinion of the Massachusetts Supreme Judicial Court ("SJC") is reported at 895 N.E.2d 1284 (Mass. 2008), and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-13a. The opinion of the Quincy Division of the District Court Department of the Trial Court ("Quincy District Court"), No. 0456 CV 0196 (2007), has not been reported but is reprinted at Pet. App. 14a-22a. The opinion of the Massachusetts Appeals Court is reported at 855 N.E.2d 1106 (Mass.App.Ct. 2006), and is reprinted at Pet. App. 23a-36a.

JURISDICTION

The Massachusetts Supreme Judicial Court entered its judgment on November 6, 2008. This Court's jurisdiction is invoked under 28 U.S.C. §1257(a).

28 U.S.C. §2403(b) may apply in this matter. Accordingly, notice was also sent to the Attorney General of the Commonwealth of Massachusetts pursuant to SUP. CT. R. 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Federal Constitutional Provisions

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8.

B. State Statutory Provisions

The relevant provisions involved in this case are the Massachusetts General Laws Chapter ("M.G.L. c.") 32, §15(4) and Chapter 266, §§18, 20, 127. M.G.L. c. 32, §15(4) states in pertinent part that "[i]n no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance . . . ." The full text of the relevant provisions is reproduced in the Appendix at Pet. App. 37a-39a.

STATEMENT OF THE CASE

This case presents two entirely novel issues to this Court because it concerns the forfeiture of a public employee's entire pension in the context of the Eighth Amendment's Excessive Fines Clause.

A. Factual Background

Petitioner, now 71 years old, retired from his position as the Chief Plumbing and Gas Inspector of the City of Quincy in January 2002 and started receiving superannuation retirement benefits. Pet. App. 3a. At that time, Petitioner had lawfully earned 26 years and five months of creditable service. Pet. App. 21a. In March 2002, a grand jury returned three indictments against Petitioner charging him with breaking into the personnel office at Quincy city hall in December 2001 and with examining his personnel file and stealing a portion of it. Pet. App. 3a. In July 2003, Petitioner pleaded guilty to breaking and entering in the daytime with intent to commit a felony in violation of M.G.L. c. 266, §18, stealing in a building in violation of M.G.L. c. 266, §20, and wanton destruction of property in violation of M.G.L. c. 266, §127. Pet. App. 3a. Petitioner was sentenced to six months unsupervised probation on each conviction, to run concurrently, and was ordered to make restitution of $393 for the damaged personnel office door and to pay a fine of $500. Pet. App. 3a.

B. Proceedings Below

1. In August 2003, Respondent Retirement Board of Quincy commenced proceedings against Petitioner and advised him of a hearing to determine whether his convictions required a forfeiture of his pension pursuant to M.G.L. c. 32, §15(4). Pet. App. 3a-4a. After conducting a hearing, Respondent notified Petitioner in December 2003 that his convictions involved a violation of the laws applicable to his office or position and that he had,

therefore, forfeited his pension in accordance with M.G.L. c. 32, §15(4). Pet. App. 4a. As a result, Petitioner forfeited approximately $576,000.00, the value of his entire pension which consists of a retirement allowance and health insurance benefits. Pet. App. 16a-17a.

2. Thereafter, Petitioner commenced an action in the Quincy District Court to seek review of Respondent's decision. Pet. App. 4a. The Quincy District Court affirmed Respondent's decision, and Petitioner filed an action in the nature of a certiorari in the Superior Court, adding nominally the Justices of the Quincy Division of the District Court Department of the Trial Court as defendants. Pet. App. 4a-5a. A Superior Court judge, however, allowed Respondent Quincy Retirement Board's motion for judgment on the pleadings, holding, among other things, that the court did not need to reach Petitioner's claim that forfeiture of his pension violated the Eighth Amendment to the United States Constitution because that claim was not raised before Respondent Retirement Board of Quincy and not considered by the Quincy District Court. Pet. App. 28a.

3. Petitioner appealed the Superior Court's decision and claimed that his convictions were not for offenses "involving violation of the laws applicable to his office or position" as required under M.G.L. c. 32, §15(4) for a pension forfeiture and that the "automatic forfeiture provision of G.L. c. 32, §15(4), as applied to him in these circumstances, would constitute an 'excessive fine' as prohibited by the Eighth Amendment to the United States Constitution." Pet. App. 28a, 31a. The Massachusetts Appeals Court affirmed the decision

with respect to the ruling that the violations to which Petitioner pleaded guilty were related to Petitioner's office or position and based this ruling in part on Petitioner's refusal to testify at the hearing before Respondent and the reasonable inferences that could be drawn therefrom. Pet. App. 29a-30a. With respect to Petitioner's Eighth Amendment claim, however, the Massachusetts Appeals Court held that the Superior Court erred in ruling that Petitioner had waived his claim that the forfeiture provision of M.G.L. c. 32, §15(4) as applied to him and the forfeiture of his pension constituted an "excessive fine" prohibited by the Eighth Amendment. Pet. App. 36a. Instead, the Massachusetts Appeals Court noted that "[t]he board clearly had no jurisdiction to decide the constitutionality of the forfeiture provision as applied to the plaintiff [Petitioner]. It is for the courts, not administrative agencies, to decide the constitutionality of statutes. Moreover, the determination of the constitutionality of a statute as applied can be one of the most difficult and sensitive tasks performed by the judiciary. *This is particularly true here given the novelty of Eighth Amendment excessive fine claims, the scarcity of precedent, the importance of pension rights, and the potential widespread applicability of the forfeiture provision.*" Pet. App. 33a (emphasis added). The Massachusetts Appeals Court vacated the judgment of the Superior Court and remanded the case to the Quincy District Court for consideration of Petitioner's Eighth Amendment claim. Pet. App. 36a. The SJC denied Petitioner's application for further appellate review. Pet. App. 5a n.6.

4. On remand, the Quincy District Court ruled that the pension forfeiture was not an

excessive fine in violation of the Eighth Amendment and purported to report two questions of law to the Massachusetts Appeals Court:

> "1. Does a forfeiture of a pension, pursuant to G.L. c. 32, §15(4), implicate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution?
>
> 2. If the Excessive Fines Clause is implicated, on the facts of this case, has [Petitioner] Maher failed to meet his burden of demonstrating the forfeiture of his pension constitutes an Excessive Fine?"

Pet. App. 6a n.7.

The SJC, noting that the judge of the Quincy District Court lacked the authority to report the case to the Massachusetts Appeals Court, transferred the case on its own motion from the Massachusetts Appeals Court in the interest of judicial economy. Pet. App. 6a.

C. The SJC's Judgment

1. (a) In its decision, the SJC "assume[d], without deciding," that the Excessive Fines Clause of the Eighth Amendment is implicated because it considered the pension forfeiture provision of M.G.L. c. 32, §15(4) to amount to "punishment" and, therefore, to constitute a "fine." Pet. App. 9a.

(b) The SJC then examined whether the forfeiture of Petitioner's pension was "excessive." The SJC stressed the importance of the principle of proportionality and seemed to engage in a

comparison between the magnitude of the forfeiture required by the statute and the gravity of the offenses. Pet. App. 10a. In its next step, the SJC stated that it would determine the gravity of the underlying offenses that triggered the forfeiture of Petitioner's pension by "gaug[ing] the degree of [Petitioner]'s culpability and consider[ing] the harm caused by the underlying offenses." Pet. App. 10a. Finally, to gauge the degree of Petitioner's culpability, the SJC cited, "among other things, the nature and circumstances of his offenses, e.g., whether there was a relationship between the crimes that triggered the forfeiture and any other illegal activities, as well as the maximum penalties authorized by the Legislature as punishment for his offenses." Pet. App. 10a. Based on this framework, the SJC came to the conclusion that the crimes were serious in nature and that the Legislature imposed substantial penalties, including prison time. Pet. App. 11a-12a. Despite the fact that the SJC itself stated that it was required to "consider the harm caused," it dismissed Petitioner's argument that the actual harm he caused consisted of the pecuniary loss for the damaged office door ($393). Pet. App. 12a. Instead, the SJC referred to the "*potential* harm to the public trust" in the selection and appointment of officials and "*any potential* harm his actions might have caused to the public fisc" in the event of Petitioner's re-appointment to his position. Pet. App. 12a-13a (emphasis added). As a final step, the SJC concluded that the total amount of the pension forfeiture, approximately $576,000, was not grossly disproportional to the gravity of the underlying offenses and concluded that Petitioner "did not meet his burden of establishing that the forfeiture violate[d] his Eighth Amendment rights." Pet. App. 13a.

REASONS FOR GRANTING THE PETITION

This case presents two entirely novel issues that have yet to be decided by this Court and are of utmost importance in light of the fact that approximately 13 states have pension forfeiture statutes. The first question concerns the issue of whether the statutory forfeiture of a public employee's pension constitutes a "fine" within the meaning of the Eighth Amendment's Excessive Fines Clause. Given a clear conflict between the Tenth Circuit of Appeals on the one hand and the SJC and, to some extent, the Second and Ninth Circuit Court of Appeals on the other hand, the Petition should be granted to ensure national uniformity as to whether the forfeiture of a public pension is a "fine" under the Excessive Fines Clause. The second issue questions the SJC's analysis in this particular case when confronted with a pension forfeiture statute, M.G.L. c. 32, §15(4), which statute automatically assumes that the forfeiture of an entire pension is always proportional, regardless of the extent of the harm actually caused by the crime or the seriousness of the crime committed. The constitutionality of M.G.L. c. 32, §15(4) as applied to Petitioner is drawn into question and necessitates guidance by this Court that has widespread applicability.

I. THE STATUTORY FORFEITURE OF A PUBLIC EMPLOYEE'S PENSION CONSTITUTES A "FINE" WITHIN THE MEANING OF THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

A. Denying a Pension Forfeiture The Character of a "Fine" Within The Meaning of The Excessive Fines Clause by Viewing a Pension As a Conditional Contract in This Context Negates The Purpose of The Eighth Amendment

1. Originally, the SJC had established a test and held in the context of a pension forfeiture that the Excessive Fines Clause requires the court "to consider first, whether there was an extraction of payments, second, whether any extraction was punitive, and third, whether any punitive extraction was excessive." *McLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1059 (Mass. 2000). The SJC "assumed, without deciding," that the Eighth Amendment's Excessive Fines Clause applies to the pension forfeiture provision of M.G.L. c. 32, §15(4) and that the forfeiture of Petitioner's pension constituted a "fine" within the meaning of the Excessive Fines Clause as it amounts to punishment. Pet. App. 9a.

2. (a) It might be argued that the Eighth Amendment's Excessive Fines Clause is not implicated with respect to a pension forfeiture because it may not be a "punitive extraction" and, as such, not a "fine" within the meaning of the Excessive Fines Clause in light of principles of contract law. In a case involving the forfeiture of a public employee's pension, the Tenth Circuit Court

of Appeals noted that a "fine" under the Excessive Fines Clause included a "payment to a sovereign as punishment for some offense.' " *Hopkins v. Okla. Pub. Employees Ret. Sys.*, 150 F.3d 1155, 1162 (10th Cir. 1998) (quoting *Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989)). The Tenth Circuit held that this notion implied "turning over 'property' of some kind that once belonged to the defendant *Id.* (citing *Austin v. United States*, 509 U.S. 602, 604 (1993)). An individual, the Tenth Circuit concluded, had no "property" rights in his pension benefits because the right to said pension "was contingent on maintaining honorable service during his tenure in office." *Id.* As a consequence, the Tenth Circuit did not deem the pension forfeiture to be a "payment" and concluded that it did not violate the Excessive Fines Clause of the Eighth Amendment. *Id.*; *see also United States v. Reed*, 54 M.J. 37, 45 (2000), *cert. denied* 531 U.S. 1080 (2001) (holding that loss of retirement benefits due to punitive discharge does not constitute punishment and, therefore, is not "fine" within meaning of Excessive Fines Clause); *Hames v. City of Miami*, 479 F.Supp.2d 1276, 1288 (S.D. Fl. March 20, 2007) (denying Eighth Amendment relevance because employee had no vested property interest in pension as pension was subject to Florida's statutory forfeiture provisions); *Ret. Bd. of the Employees' Ret. Sys. of the State of R. I. and City of Cranston v. Azar*, 721 A.2d 872, 880 (1998), *cert. denied* 526 U.S. 1116 (1999) (holding reduction or revocation of public employee's pension is "ineluctable consequence" of failure to satisfy inherent condition of public employment).

3. On the other hand and as stated above, the SJC assumed, without deciding, that the

Excessive Fines Clause applies to the pension forfeiture statute. Pet. App. 9a. In addition, the United States Court of Appeals for the Second Circuit held with respect to a due process challenge against the forfeiture of a teacher's pension that "a property interest in contractual rights to a pension vests when a teacher becomes a member of the retirement system, subject to being divested if the . . . statutory conditions are not met." *Winston v. City of New York*, 759 F.2d 242, 248-249 (2nd Cir. 1985) (citing with approval *Birnbaum v. Teachers Ret. Sys.*, 5 N.Y. 2d 1 (1958), which rejected proposition that pension rights remain inchoate prior to retirement but rather "vest" when employee becomes member of retirement system). Finally, the Ninth Circuit Court of Appeals held that the deprivation of pension or disability benefits amounts to the deprivation of constitutionally protected "property". *Portman v. County of Santa Clara*, 995 F.2d 898, 906 (9th Cir. 1993).

Given the fact that approximately 13 states have pension forfeiture statutes with different scopes of forfeiture and the split between the courts mentioned above with respect to the nature of pension benefits and the possibility to forfeit them, it is critical and of national importance to settle the novel issue of whether the forfeiture of a public employee's pension is a "fine" that implicates the Excessive Fines Clause of the Eighth Amendment.

4. Although the cases cited above display a clear split of opinion with respect to the characterization of pensions, the issue whether the forfeiture of a pension constitutes a "fine" within the meaning of the Excessive Fines Clause cannot be answered by resorting to principles of contract law

and restricting the analysis to the nature of pension benefits. Rather, the answer to this question is linked to the other relevant question: What kind of forfeiture is the forfeiture of a pension?

5. (a) The Eighth Amendment's Excessive Fines Clause is applicable to the States through the Due Process Clause of the Fourteenth Amendment. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-434 (2001). Moreover, the Excessive Fines Clause is not limited to criminal proceedings. *Austin v. United States*, 509 U.S. 602, 607-608 (1993); *see also United States v. Ursery*, 518 U.S. 267, 281 (1996) (citing *Austin* with respect to issue of forfeiture in context of Excessive Fines Clause). Thus, the argument that the Eighth Amendment's Excessive Fines Clause is not implicated in the context of a pension forfeiture is misplaced and disregards the purpose of the Eighth Amendment: To limit the "government's power to extract payments, whether in cash or in kind, 'as *punishment* for some offense.' " *Austin*, 509 U.S. at 609-10 (quoting *Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

(b) Forfeitures, which are payments in kind, constitute "fines" if they are punishment for an offense. *United States v. Bajakajian*, 524 U.S. 321, 328 (1998). Thus, reducing the forfeiture of a pension to a conditional contract whose violation is being used to justify the loss of an entire pension because it does not appear to involve turning over "property" of some kind as held by the Tenth Circuit in *Hopkins* fails to neglect that this Court stated in *Bajakajian* that payments can be in cash or in kind and that forfeitures are payments in kind. In this context, the fact is very significant that Petitioner

honorably served the City of Quincy for more than 26 years, had lawfully earned his creditable service during that time, and had already received pension payments for approximately one year and a half before he lost his pension. Pet. App. 3a-4a, 21a. Hence, the proper analysis as to whether the forfeiture of a public employee's pension is a "fine" within the meaning of the Excessive Fines Clause must not revolve around a determination whether a pension is a conditional contract with implied conditions that may or may not be violated at a certain date. Rather, the proper analysis concerning the forfeiture of a pension must focus on the issue clearly articulated by this Court in *Bajakajian*: Does the forfeiture constitute punishment? *Cf. Bajakajian*, 524 U.S. at 328 (commencing analysis of forfeiture of currency by determining that it constitutes punishment). If it does not, the Eighth Amendment is not implicated. If, however, it is punishment, the Excessive Fines Clause clearly applies and governs the limits on the government's power to extract payments as punishment for some offense.

B. The Statutory Forfeiture of a Public Employee's Pension Constitutes Punishment for Purposes of The Excessive Fines Clause.

1. (a) In the context of Excessive Fines Clause analysis, the question is not whether a forfeiture is part of a criminal or civil proceeding, but rather whether it is punishment. *Austin v. United States*, 509 U.S. 602, 610 (1993). In *Austin*, this Court observed that the First Congress viewed forfeiture as punishment. *Austin*, 509 U.S. at 613.

This Court reasoned that the forfeiture of a truly innocent owner's property would raise "serious constitutional questions." *Id.* at 617 (citing *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689-690 (1974)). As a consequence, if "forfeiture had been understood not to punish the owner, there would have been no reason to reserve the case of a truly innocent owner. Indeed, it is *only* on the assumption that forfeiture serves in part to punish that the Court's past reservation of that question makes sense." *Id.* at 617-618 (emphasis added) (citing *Peisch v. Ware*, 8 U.S. 347, 364 (1808) (4 Cranch 347) ("[T]he act punishes the owner with a forfeiture of the goods . . . ."); *Goldsmith-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (" '[S]uch misfortunes are in part owing to the negligence of the owner, and therefore, he is properly punishable by such forfeiture.' ")).

(b) In the instant case, for example, Respondent Retirement Board of Quincy and the SJC's judgment stripped Petitioner of his pension pursuant to M.G.L. c. 32, §15(4) after he had pleaded guilty to certain offenses. On the other hand, M.G.L. c. 32, §15(4) does not distinguish between a situation involving losses to the public fisc and a situation where no such losses exist as a result of the offenses triggering the pension forfeiture. The statute does not calibrate the forfeiture by considering the actual harm caused and contemplating partial forfeiture. Without minimizing Petitioner's illegal actions, one has to consider the amount of $393 for a broken door the City incurred as a result of Petitioner's crimes and must conclude that the City's actual damages dwarf in comparison with the approximately $576,000 Petitioner lost when Respondents applied M.G.L. c. 32, §15(4) to strip him of his entire

pension, including medical benefits. Thus, there exists no remedial purpose as a basis for M.G.L. c. 32, §15(4) and the SJC's judgment, but rather a purely punitive legislative intent. Likewise, the Oklahoma pension forfeiture statute, for instance, provides:

> "Any [elected or appointed state or county] officer or employee upon final conviction of, or pleading guilty to . . . , a felony in a state or federal court . . . shall vacate such office or employment and if such felony or other offense violates his or her oath of office shall forfeit all benefits of said office or employment, including, but not limited to, retirement benefits provided by law . . . ."

OKLA. STAT. tit. 51, §24.1(A).

Just like M.G.L. c. 32, §15(4), OKLA. STAT. tit. 51, §24.1(A) does not indicate any remedial purpose but displays a clear intent to punish a public employee for the commission of a "felony or other offense" in violation of his or her oath by forfeiting a pension. Given this Court's precedent in *Austin*, *Calero-Toledo*, *Peisch*, and *Goldsmith-Grant*, the forfeiture of a pension such as Petitioner's simply serves to punish individuals for office-related crimes. Therefore, the forfeiture of a pension pursuant to a statute such as M.G.L. c. 32, §15(4) constitutes "punishment" within the meaning of the Excessive Fines Clause. *Cf. Eyers v. State, Bd. of Trs. Pub. Employees' Ret. Sys.*, 449 A.2d 1261, 1263 (N.J. 1982) ("pension forfeiture . . . is penal in nature and has as its objectives the same considerations

underlying all such schemes: punishment of the individual and deterrence . . . ."); *Stapleton v. Two Million Four Hundred Thirty-Eight Thousand, One Hundred and Ten Dollars*, 454 F.2d 1210, 1216 (3rd Cir. 1972) (holding that "statute creating a forfeiture is penal in nature and must be strictly construed").

(c) On the other hand, one might suggest that the implementation of a statute such as M.G.L. c. 32, §15(4) is not punishment but only a "ministerial step" to effectuate formally what already has occurred by operation of law" and that an individual's right to receive a pension was merely a contingent hoped-for-benefit that dissolved under contract law as a result of a conviction, which was a "condition subsequent," discharging the Retirement Board of its obligation to provide a pension. *State Bd. of Ret. v. Woodward*, 847 N.E.2d 298, 304, 304 n.7 (Mass. 2006). Stated differently, one might argue that honorably rendering public service was the "sine qua non" of Petitioner's employment so that a failure to satisfy that condition would justify a forfeiture of Petitioner's pension. *Ret. Bd. of the Employees' Ret. Sys. of the State of R. I. and City of Cranston v. Azar*, 721 A.2d 872, 880 (1998), *cert. denied* 526 U.S. 1116 (1999). And although, one might say, a forfeiture statute such as "[M.G.L. c. 32,] §15(4) contains an element of deterrence, it also serves other, non-punitive purposes, such as protection of the public fisc and preserving respect for government service." *McLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1063 (Mass. 2000); *see also In re Alva*, 92 P.3d 311, 330 (Cal. 2004) (noting that not every remedial measure is "punishment" just because it has any deterrent or retributive effect). Finally, even though the SJC, for example, believed that M.G.L. c. 32, §15(4) was "penal for purposes of

statutory construction, i.e., . . . [construing] the statutory language narrowly," the court did not intend to comment on the penal character of M.G.L. c. 32, §15(4) for any other purpose. *Gaffney v. Contributory Ret. Appeal Bd.*, 665 N.E.2d 998, 1000 n.3 (Mass. 1996), *cited in State Bd. of Ret. v. Bulger*, 843 N.E.2d 603, 607 (Mass. 2006).

(d) This line of arguments, however, still deflects from the real character of pension forfeitures and the methodology to determine their true nature: The distinction between civil *in rem* forfeitures and *in personam* criminal forfeitures.

(i) Traditional *in rem* forfeitures were directed against "guilty property" rather than against the offender himself. *United States v. Bajakajian*, 524 U.S. 321, 330 (1998). The reason behind this notion was the legal fiction that the property was "guilty and condemned as though it were conscious instead of inanimate and insentient." *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931), *quoted in United States v. Bajakajian*, 524 U.S. 321, 330 (1998). Hence, the conduct of the property owner was irrelevant. *United States v. Bajakajian*, 524 U.S. 321, 330 (1998). As the proceeding *in rem* was conducted separately from, and independently of, any criminal proceeding *in personam*, traditional *in rem* forfeitures were not deemed to be punishment against the individual for an offense but rather considered to be remedial in purpose. *Id.* at 331 (citing *Taylor v. United States*, 44 U.S. 197, 210 (1845) (3 How. 197)).

(ii) The other kind of forfeitures – *in personam* criminal forfeitures – have historically

been treated as punitive because they were part of the punishment that an offender received for felonies and treason in the Middle Ages and at common law. *United States v. Bajakajian*, 524 U.S. 321, 332 (1998). The hallmarks of an *in personam* criminal forfeiture exist where the forfeiture "serves no remedial purpose, is designed to punish the offender, and cannot be imposed upon innocent owners [of property]." *Id.* Hence, *in personam* criminal forfeitures are "a form of monetary punishment, no different, for Eighth Amendment purposes, from a traditional 'fine'." *Alexander v. United States*, 509 U.S. 544, 558 (1993); *see also United States v. Ursery*, 518 U.S. 267, 275 (1996) (citing *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931) and noting "sharp distinction" between *in rem* civil *forfeitures* and *in personam* civil *penalties* such as fines). As such, *in personam* criminal forfeitures should be analyzed under the Excessive Fines Clause. *Alexander*, 509 U.S. at 559.

(iii) The pre-eminent purpose actually served by forfeiture statutes such as M.G.L. c. 32, §15(4) and OKLA. STAT. tit. 51, §24.1(A) – after conviction- is to punish individuals like Petitioner for certain office-related offenses as their pension is not "guilty property" or an "instrumentality" of the crime. Hence, forfeitures pursuant to such statutes are not civil *in rem* forfeitures but *in personam* punitive forfeitures. The SJC, for example, also explained that M.G.L. c. 32, §15(1)-(3) represents a "restitutionary scheme" to allow recovery for misappropriated funds and costs of investigation, whereas M.G.L. c. 32, §15(4) "adds" a forfeiture remedy of intermediate severity. *Gaffney v. Contributory Ret. Appeal Bd.*, 665 N.E.2d 998, 1001 (Mass. 1996). Stated differently, §15(1)-(3) is

remedial in nature, whereas §15(4) is devoid of a restitutionary purpose and only designed to punish individuals such as Petitioner because the forfeiture cannot be imposed unless the individual was previously convicted of an office-related offense. *Cf. United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (noting that forfeiture of currency constitutes punishment in light of statute directing court to order forfeiture as "additional sanction" after conviction of reporting violation). The fact that the SJC viewed M.G.L. c. 32, §15(4) to be penal for purposes of statutory construction and not for any other purpose does not negate its character as "punishment" due to its quality as an *in personam* punitive forfeiture. As a consequence, the view that the implementation of statutes such as M.G.L. c. 32, §15(4) and OKLA. STAT. tit. 51, §24.1(A) and the subsequent proceeding is merely a ministerial step has absolutely no bearing on the forfeiture's feature as an *in personam* criminal forfeiture and its true character as a form of monetary "punishment" for the commission of certain office-related offenses.

(iv) Moreover, precedent confirms that the word "fine" in a statute "is defined not only as a pecuniary punishment, but also as a forfeiture, a penalty, [etc.]." *Hanscomb v. Russell*, 77 Mass. 373, 375 (1858) (11 Gray 373). Stated differently, "the word 'fines' means forfeitures and penalties recoverable in civil actions, as well as pecuniary punishments inflicted by sentence." *Hanscomb*, 77 Mass. at 375, *cited in Browning-Ferris, Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 296 (1989) (O'Connor, J., concurring in part and dissenting in part). This Court later echoed this idea when it noted that dictionaries of the time of the First Congress confirm that the term "fine" was

understood to include "forfeiture" and vice versa. *Austin v. United States*, 509 U.S. 602, 614 n.7 (1993); *Dep't of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 780 (1994) (characterizing "fines, penalties, and forfeitures . . . as sanctions).

(v) Finally, in *Bajakajian*, this Court noted that even if the forfeiture of currency also served some remedial purpose, "the forfeiture would still be punitive in part. . . This is sufficient to bring the forfeiture within the purview of the Excessive Fines Clause." *United States v. Bajakajian*, 524 U.S. 321, 329 n.4 (1998); *see also Austin v. United States*, 509 U.S. 602, 622 n.14 (1993) (Excessive Fines Clause prohibits only imposition of 'excessive' fines, and fine that serves purely remedial purposes cannot be considered 'excessive' in any event). Thus, even if the forfeiture of a public pension were remedial in some way, the forfeiture would still be punitive in part and, therefore, a "fine" within the meaning of the Excessive Fines Clause.

As a consequence, the argument that a pension is only a "contingent" agreement may be useful in the context of contract law, but it only masks the sensitive constitutional implication of the Eighth Amendment's Excessive Fines Clause in the context of a pension forfeiture as payment in kind, particularly where an individual such as Petitioner had already started receiving retirement benefits. Therefore, the forfeiture of a public employee's pension as a result of office-related offenses constitutes "punishment" in the plain meaning of the word and, therefore, is a "fine" within the meaning of the Eighth Amendment's Excessive Fines Clause. The Petition should be granted to ensure national

uniformity on this crucial and persistent issue of law.

II. THE SJC ERRED IN CONCLUDING THAT THE FORFEITURE OF PETITIONER'S ENTIRE PENSION WAS NOT EXCESSIVE

A. The SJC Erred in Concluding That The Forfeiture of Petitioner's Entire Pension Was Not Excessive When It Based Its Decision on a Forfeiture Statute That Is Devoid of Any Proportionality Review.

After determining that the forfeiture of a public pension constitutes punishment and is, therefore, a "fine" within the meaning of the Excessive Fines Clause, the next step of the inquiry concerns the constitutionality of the SJC's judgment and M.G.L. c. 32, §15(4) as applied to Petitioner and the question of whether the fine was "excessive."

A. As a general matter, Excessive Fines Clause analysis centers around "the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (citing *Austin v. United States*, 509 U.S. 602, 622-623 (1993); *Alexander v. United States*, 509 U.S. 544, 559 (1993) to illustrate examination of relationship between extent of forfeiture and criminal conduct). With respect to punitive forfeitures, i.e., *in personam* criminal forfeitures, the Excessive Fines Clause is violated if the forfeiture is "grossly disproportional"

to the gravity of the offense. *Bajakajian*, 524 U.S. at 334. In applying this standard of gross disproportionality, appellate courts must review the proportionality analysis de novo and compare the amount of the forfeiture to the gravity of the offense. *Bajakajian*, 524 U.S. at 336-337. And if the amount of the forfeiture is grossly disproportional to the gravity of the crime, it is unconstitutional as contravening the command of the Eighth Amendment to prevent excessive fines. *Id.* at 337.

B. (a) Hosep Bajakajian and his family were waiting at Los Angeles International Airport in June 1994 to board a plane to Italy. *United States v. Bajakajian*, 524 U.S. 321, 324 (1998). Search dogs discovered a large amount of cash, leading customs inspectors to conduct a search of Bajakajian's luggage. *Bajakajian*, 524 U.S. at 324-325. The cash total Bajakajian failed to report amounted to $357,144. *Id.* at 325. The Government seized the currency and arrested Bajakajian. *Id.*

(b) In subsequent proceedings, Bajakajian pleaded guilty to willfully failing to report that he was transporting more than $10,000 outside the United States. *United States v. Bajakajian*, 524 U.S. 321, 325 (1998). After a bench trial on the issue of forfeiture pursuant to 18 U.S.C. §982(a)(1), the District Court concluded that the entire $357,144 was subject to forfeiture because "it was involved" in the offense, but concluded that such a forfeiture would be grossly disproportional to the offense and that it would violate the Excessive Fines Clause. *Id.* at 325-326. Hence, the District Court sentenced Bajakajian to three years of probation, a fine of $5,000 and ordered the forfeiture of $15,000. *Id.* at 326. The Government sought the forfeiture of

the entire $357,144 and appealed. *Id.* at 326. The Court of Appeals for the Ninth Circuit affirmed the District Court's decision and held that the forfeiture ordered by 18 U.S.C. §982(a)(1) was per se unconstitutional in cases involving currency forfeitures. *Bajakajian*, 524 U.S. 326-327.

C. In establishing and applying the standard of gross disproportionality in *Bajakajian* to determine whether the forfeiture of Bajakajian's entire $357,144 would be unconstitutional, this Court noted that the essence of his crime was a willful failure to report the removal of the currency. *Id.* at 337. In addition, this Court noted that:

(1) Bajakajian's crime was unrelated to any other illegal activities;

(2) His money, the subject of the forfeiture, resulted from legal activity and was to be used to pay a lawful debt;

(3) The actual harm Bajakajian caused was minimal because his failure to report affected the Government in a minor way and because he had caused no loss to the public fisc and deprived the Government only of the information that $357,144 had left the United States; and

(4) The maximum sentence that could have been imposed under the Sentencing Guidelines was six months and the maximum fine was $5,000. *Id.* at 337-339.

Based on this analysis, this Court concluded that the forfeiture of the $357,144 would be grossly disproportional and violate the Excessive Fines Clause. *Id.* at 344.

D. The instant case and *Bajakajian* are comparable in more than one way:

(1) Just like in *Bajakajian*, Petitioner's crimes here were unrelated to any other illegal activity: Petitioner never misappropriated any funds from the City and did not engage in any other illegal activity connected to his office such as accepting bribes;

(2) Just like the money in *Bajakajian*, Petitioner had lawfully accrued his pension during his honorable service over the course of 26 years and five months;

(3) Just like in *Bajakajian*, the actual harm Petitioner caused was small and consisted of a damaged door for which he paid restitution in the amount of $393. He had caused no loss to the public fisc. What the SJC called the "potential harm to the public trust" is simply non-quantifiable in monetary terms and cannot serve as a basis for a forfeiture of an entire pension with a value of $576,000; and finally

(4) The Massachusetts state legislature imposed the following possible

sentences for the crimes Petitioner pleaded guilty to:

(a) For the crime of breaking and entering in the daytime with intent to commit a felony in violation of M.G.L.c. 266, §18, a possible sentence of up to ten years in State prison or a fine of not more than $500 and imprisonment in jail for not more than two years. Pet. App. 38a;

(b) For the crime of stealing in a building in violation of M.G.L.c. 266, §20, a possible sentence of up to five years in State prison or a fine of not more than $500 or imprisonment in jail for not more than two years. Pet. App. 38a; and

(c) For the crime of wanton destruction of property in violation of M.G.L.c. 266, §127, a possible sentence of a fine of $1,500 or three times the value of the property so destroyed or damaged, whichever is greater, or by imprisonment for not more than two and one-half years. Pet. App. 39a.

Petitioner was sentenced to six months unsupervised probation on each conviction, to run concurrently, and was ordered to make restitution of $393 and to pay a fine of $500. In *Bajakajian*, the

forfeiture of $357,144 that the Government sought was grossly disproportional to the gravity of the offense as it was "larger than the $5,000 fine imposed by the District Court by many orders of magnitude . . . and [bore] no articulable correlation to any injury suffered by the Government." *United States v. Bajakajian*, 524 U.S. 321, 339-340 (1998). Stated differently, in *Bajakajian*, the forfeiture of $357,144 would have been 71 times greater than the fine of $5,000. Here, the forfeiture of Petitioner's entire pension of $576,000 is 645 (!) times larger than the $500 fine and the restitutionary payment of $393 taken together. Just like in *Bajakajian*, it is larger by many orders of magnitude and bears no articulable correlation to any injury suffered by the City.

While the damaged door and the "potential harm to the public trust" may justify the partial forfeiture of Petitioner's pension, the forfeiture of his entire pension in light of the possible sentences authorized by the Legislature and the actual sentence received by Petitioner require the conclusion that the full forfeiture of his pension is grossly disproportional to the gravity of the offenses and unconstitutional as an excessive fine.

E. This result of gross disproportionality is confirmed by the history of the Eighth Amendment's Excessive Fines Clause.

(1) The original U.S. Constitution was criticized in the Massachusetts and Virginia Conventions for its failure to include any protection for people convicted of crimes. *Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989). As a

result, the Eighth Amendment was adopted with the particular intent of limiting the Government's powers. *Browning-Ferris Indus. of Vt., Inc.*, 492 U.S. at 266. Specifically, the Excessive Fines Clause's goal was to place limitations on the ability of the sovereign to exercise "its prosecutorial power, including the power to collect fines, for improper ends." *Id. at* 267. The ancestors of today's fines were payments to the Crown called "amercements," which were paid by individuals who were "in the King's mercy" due to some act that was offensive to the Crown. *Id. at* 269. However, in response to frequent abuses by the King, Magna Charta included provisions which required that "the amount of the amercement be proportioned to the wrong . . .[,] that the amercement not be so large as to deprive [a wrongdoer] of his livelihood, and by requiring that the amount of the amercement be fixed by one's peers, sworn to amerce *only* in a proportionate amount." *Id.* at 271 (emphasis added). As Justice O'Connor clarified in *Browning-Ferris*, amercements and fines were not meant to compensate a person, but rather to punish the wrongdoer and express society's disapproval at the improper act, and Magna Charta ensured that the monetary penalties had some measure of proportionality. *Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 293 (1989) (O'Connor, J., concurring in part and dissenting in part). Specifically, Chapter 20 of Magna Charta required as follows:

> "A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contenement; (20 and a Merchant likewise, saving to him his merchandise; (3) and any other's villain than our shall be likewise amerced, saving his wainage."

United States v. Bajakajian, 524 U.S. 321, 335-336 (1998) (quoting Magna Charta, 9 Hen. III, ch. 14 (1225), 1 Stat. at Large 6-7 (1762 ed.); *see also Browning-Ferris Indus. of Vt., Inc., v. Kelco Disposal, Inc.*, 492 U.S. 257, 288 (1989) (O'Connor, J., concurring in part and dissenting in part) (referring to Chapter 20 of Magna Charta).

Justice O'Connor also pointed out in *Browning-Ferris* that §37 of the Massachusetts Body of Liberties of 1641 required the imposition of "a proportionable fine" and that the Massachusetts General Court ruled in 1646 that §37 of the Massachusetts Body of Liberties was based directly on Chapter 20 of Magna Charta. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 295-296 (1989) (O'Connor, J., concurring in part and dissenting in part) (citing 1 B. Schwartz, The Bill of Rights: A Documentary History 76 (1971)).

(2) By contrast, the SJC noted that M.G.L. c. 32, §15(4) "does not allow . . . any discretion as to the revocation of pension benefits." *McLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1063 (Mass. 2000). Moreover, the SJC's judgment in the instant case - based on M.G.L. c. 32, §15(4) - deflated the proportional forfeiture framework traced to Magna

Charta when it justified the forfeiture of Petitioner's entire pension by assuming a relationship between the benefits forfeited, i.e. $576,000 (including health insurance), and the "potential harm to the public trust." Pet. App. 12a-13a. This Court's precedent, Chapter 20 of Magna Charta, and §37 of the Massachusetts Body of Liberties of 1641, however, require that Petitioner's pension forfeiture be proportional so that he keep at least his livelihood, which would strongly suggest a partial forfeiture as opposed to a full forfeiture. *Cf. Uricoli v. Bd. of Trs., Police and Firemen's Ret. Sys.*, 449 A.2d 1267, 1276 (N.J. 1982) (considering employee's 20 years of honorable service, adequate penal sanctions, lack of venality, and absence of personal gain obtained from illegal act as basis for partial forfeiture as opposed to full forfeiture of pension). Yet neither M.G.L. c. 32, §15(4) nor the SJC envisioned such a possibility and instead gravely impaired Petitioner's livelihood.

B. The SJC Erred in Concluding That The Forfeiture of Petitioner's Entire Pension Was Not Excessive When It Treated The Pension Like "Guilty Property" as Applicable to Civil *In Rem* Forfeitures Rather Than Recognizing The Pension Forfeiture as an *In Personam* Criminal Forfeiture.

A. One might refer to the cases involving customs laws violations and argue that the proportionality of Petitioner's full pension forfeiture is shown by the fact that the First Congress enacted statutes authorizing full forfeiture of goods that were involved in customs or piratical offenses or requiring the payment of monetary penalties that were in

proportion to the goods' value. *See The Palmyra*, 25 U.S. 1, 14-15 (1827) (12 Wheat. 1) (forfeiture of vessel); *Dobbins Distillery v. United States*, 96 U.S. 395, 400-401 (1877) (6 Otto 395) (forfeiture of distillery); *Stockwell v. United States*, 80 U.S. 531, 547 (1871) (13. Wall. 531) (forfeiture of shingles and liability to pay double their value considered remedial); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972) (forfeiture of undeclared goods and imposition of monetary penalty remedial in character).

Further, the SJC's judgment appears to suggest that M.G.L. c. 32, §15(4) serves the important remedial purpose of compensating the City for the financial harm it might have incurred had Petitioner's actions gone undetected, thereby deterring the commission of offenses in violation of the laws related to a public office. Pet. App. 12a-13a. Simple disgorgement of ill-gotten gains, one might argue, would not be enough. Rather, deterrence "requires more, a penalty that places the violator in a position worse than he would have occupied before his violation." *McLean v. State Bd. of Ret.*, 733 N.E. 2d 1053, 1061 (Mass. 2000).

B. In *Bajakajian*, the Government argued that there was "a correlation between the amount forfeited [$357,144] and the harm the Government *would have* suffered *had the crime gone undetected*." *United States v. Bajakajian*, 524 U.S. 321, 339 (1998) (emphasis added). But this Court clarified that "[t]here is no inherent proportionality in such a forfeiture." *Bajakajian*, 524 U.S. at 339 (holding that it is impossible to conclude that harm respondent Bajakajian caused is anywhere near 30 times greater than that caused by hypothetical drug

dealer who willfully fails to report taking $12,000 out of country to purchase drugs). Comparing the *in personam* criminal forfeiture of $357,144 with any injury the Government suffered, this Court concluded that there was "no articulable correlation." *Id.* at 340.

C. Here, just like in *Bajakajian*, it is impossible to conclude that the harm Petitioner actually caused is anywhere near 30 times greater than that caused by a hypothetical wrongdoer who willfully fails to comply with the procedure for selecting and appointing officials and receives a salary for several years. The SJC's argumentative frame, however, that the forfeiture of Petitioner's entire pension of $576,000 was justified because of the "potential harm to the public trust" and "any potential harm his actions might have caused to the public fisc" if he had succeeded in being re-appointed as the City's Chief Plumbing and Gas Inspector and might have earned a certain salary for a certain period of time is built on pure speculation. Pet. App. 12a-13a. It is not at all certain and simply an unproven legal hypothesis whether Petitioner would have been reappointed. There is "no inherent proportionality" between such guesswork on the one hand and a full pension forfeiture on the other hand. More precisely, the forfeiture of Petitioner's entire pension bears no articulable correlation to any injury suffered by the City and is, therefore, not remedial at all. Rather, given the harm Petitioner actually caused, a partial forfeiture would comport much more with the principles of the Excessive Fines Clause and the need for proportionality to address the wrong of his actions.

D. It follows that the forfeiture of Petitioner's entire pension and its statutory basis under M.G.L. c. 32, §15(4) renders the determination of forfeiture an "all-or-nothing" event. In a case concerning the Eighth Amendment's Excessive Fines Clause, the Fourth Circuit noted with respect to the civil *in rem* forfeiture of an entire farm that was involved in violations of federal drug laws that "the property in kind is at stake, and not its value, [so that] a judgment of forfeiture is largely an *all-or-nothing* situation and an inquiry into excessiveness can determine *only on which side of the line the facts place the property*." *United States v. Chandler*, 36 F.3d 358, 364 (4th Cir. 1994) (emphasis added), *cert. denied* 514 U.S. 1082 (1995).

E. The fundamental error of the SJC lies in the fact that it based its judgment on a forfeiture statute - M.G.L. c. 32, §15(4) – that renders pension forfeiture an "all-or-nothing" event by lacking any possibility of a partial forfeiture and by neglecting to consider the extent of any actual harm caused by the offenses.

(a) Although the SJC seems to engage in a proportionality review that is supposed to take into account the harm caused by Petitioner, the SJC treated the pension in the end result like "an instrumentality of the crime", like "guilty property" under a civil *in rem* forfeiture situation because an inquiry into excessiveness by the SJC "determines only on which side of the line the facts place the entire pension." Partial forfeiture was neither an option under M.G.L. c. 32, §15(4) nor envisioned by the SJC. Thus, full forfeiture or no forfeiture at all caused the SJC to conclude that Petitioner should lose his entire pension and health

benefits thereunder. To justify this result with the goal of deterrence in the absence of a remedial purpose is misplaced. This Court explained with respect to the currency in *Bajakajian* that "[d]eterrence . . . has traditionally been viewed as a goal of punishment, and forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss." *United States v. Bajakajian*, 524 U.S. 321, 329 (1998). Given the *in personam* punitive forfeiture that Bajakajian was subject to, this Court noted concisely that "[a]lthough the Government has asserted a loss of information regarding the amount of the currency leaving the country, that loss would not be remedied by the Government's confiscation of [Bajakajian's] $357,144." *Bajakajian*, 524 U.S. at 329.

(b) In the instant case, justifying the forfeiture of Petitioner's entire pension with a need for deterrence in light of the "potential harm to the public trust" does not square with the fact that the forfeiture in the instant case qualifies as an *in personam* punitive forfeiture and constitutes punishment for purposes of the Excessive Fines Clause. Just like in *Bajakajian* with respect to the Government's asserted loss of information, the SJC's asserted "potential harm to the public trust" is non-quantifiable and would not be remedied by the City's confiscation of Petitioner's entire pension valued at $576,000. Yet that is how the SJC and M.G.L. c. 32, §15(4) treated Petitioner's Pension: Like a civil *in rem* forfeiture involving an "instrumentality" of the crime that serves a fictitious "remedial" purpose and is supposed to compensate the City for "any potential harm [Petitioner's] actions might have caused to the public fisc." Pet. App. 13a. Previously, this Court determined a state tax on the possession of drugs to

be unconstitutional under the Double Jeopardy Clause because it was the "functional equivalent" of a successive prosecution and conditioned upon the commission of a crime. *Department of Revenue of Mont. v. Kurth Ranch,* 511 U.S. 767, 782 (1994). Here, by analogy, Petitioner's forfeiture of his entire pension is equally unconstitutional: Even though it is an *in personam* criminal forfeiture, M.G.L. c. 32, §15(4) and the SJC turn the forfeiture into the functional equivalent of an "all-or-nothing" civil *in rem* forfeiture - despite the fact that the pension does not qualify as "guilty property" and bears no resemblance to the traditional cases concerning customs laws.

(c) The SJC's reliance on *McLean* is equally misplaced. Pet. App. 13a. In *McLean*, the defendant, McLean, received $512,000 as a result of his criminal activity and forfeited a pension with an approximate value of $625,000. *McLean v. State Bd. of Ret.*, 733 N.E.2d 1053, 1061 (Mass. 2000). In the instant case, however, Petitioner has had no monetary gain as a result of his offenses. Yet Petitioner is supposed to forfeit a full pension with a value of $576,000, including health insurance benefits. As there are no actual damages in excess of the damaged door valued at $393 in the instant case, the SJC's asserted "potential harm to the public trust" or the "potential harm to the public fisc" simply cannot be compared to the actual gains of $512,000 in *McLean*. Therefore, there is no articulable and judicially sound relationship between any injury suffered by the City and Petitioner's loss of his entire pension.

(d) Lastly, the SJC's reference to the maximum penalties authorized under M.G.L. c. 266,

§§18, 20 and 127 is equally unpersuasive. Pet. App. 11a-12a. This Court noted as follows in *Bajakajian*:

> "In considering an offense's gravity, the other penalties that the Legislature has authorized are certainly relevant evidence. Here, as the Government . . . stress[es], Congress authorized a maximum fine of $250,000 plus five years' imprisonment for willfully violating the statutory reporting requirement, and this suggests that it did not view the reporting offense as a trivial one. That the maximum fine and Guideline sentence to which [Bajakajian] was subject were but a fraction of the penalties authorized, however, *undercuts any argument based solely on the statute, because they show that [Bajakajian's] culpability relative to other potential violators of the reporting provision . . . is small indeed.* This disproportion is telling nothwithstanding the fact that a separate Guideline provision permits forfeiture if mandated by statute. . . . That Guideline, however, *cannot override the constitutional requirement of proportionality review*."

United States v. Bajakajian, 524 U.S. 321, 339 n.14 (1998) (emphasis added). In the instant case, Petitioner was sentenced in criminal court to six months of unsupervised probation, a $500 fine and ordered to make restitution in the amount of $393 for the damaged door. This fact and the other penalties authorized by M.G.L. c. 266, §§18, 20 and

127 undercut any argument based solely on the possible *maximum* penalties because it shows Petitioner's culpability relative to other potential violators as rather small. Moreover, the maximum penalties under M.G.L. c. 266, §§18, 20 and 127 cannot override the constitutional requirement of proportionality review and the need for a partial forfeiture. But neither M.G.L. c. 32, §15(4) nor the SJC contemplated a partial forfeiture of Petitioner's pension to avoid a grossly disproportional full forfeiture. More precisely, recognizing the fact that a pension forfeiture under M.G.L. c. 32, §15(4) represents an *in personam* punitive forfeiture would have opened the door for a more calibrated partial forfeiture and a case-by-case determination that could meaningfully co-exist with the commandments of the Excessive Fines Clause. In truth, M.G.L. c. 32, §15(4) and the SJC's judgment conflict with the historical distinctive forfeiture framework established by this Court and eviscerate the protections of the Eighth Amendment's Excessive Fines Clause and its historic predecessors.

Based on the foregoing, the forfeiture of Petitioner's entire pension is grossly disproportional to the gravity of his offenses and the harm caused. The SJC's judgment and M.G.L. c. 32, §15(4) as applied to Petitioner violate the Eighth Amendment's Excessive Fines Clause.

CONCLUSION

For the above reasons, Petitioner respectfully requests that the petition for a writ of certiorari be granted and that the Court reverse the judgment of the SJC.

Respectfully submitted,

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APPENDIX A

Supreme Judicial Court of Massachusetts, Norfolk.
Ralph J. MAHER
v.
RETIREMENT BOARD OF QUINCY & others.[1]

Argued Sept. 4, 2008.
Decided Nov. 6, 2008.

Background: Retired city employee petitioned for judicial review of decision of city retirement board requiring forfeiture of retirement allowance on grounds that employee committed a criminal offense involving violation of laws applicable to his office or position as chief plumbing and gas inspector. The District Court Department, Quincy Division, granted judgment on the pleadings to retirement board. Employee sought certiorari review. The Superior Court Department, Norfolk County, Barbara A. Dortch-Okara, J., granted judgment on the pleadings to retirement board. Employee appealed. The Appeals Court, 67 Mass.App.Ct. 612, 855 N.E.2d 1106, vacated and remanded. On remand, the District Court Department, Mark S. Coven, J., ruled that forfeiture of retirement allowance was not an excessive fine in violation of the Eighth Amendment, and purported to report questions of law to the Appeals Court. The Supreme Judicial Court transferred the case from the Appeals Court.

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[1] Justices of the Quincy Division of the District Court Department of the Trial Court, as nominal parties.

Holdings: The Supreme Judicial Court, Ireland, J., held that:
(1) District Court judge lacked authority to report the case to the Appeals Court, and
(2) assuming that the Excessive Fines Clause of the Eighth Amendment applied to forfeiture of a public employee's pension, the total amount forfeited by employee, which was approximately $576,000, was not grossly disproportional to the gravity of the triggering offenses to which he pled guilty.
District Court affirmed; remanded.

Frank J. McGee for the plaintiff.

Michael Sacco for the defendant.

Martha Coakley, Attorney General, & Neil P. Olson, Assistant Attorney General, for the Attorney General & another, amici curiae, submitted a brief.

Present: MARSHALL, C.J., GREANEY, IRELAND, SPINA, COWIN, CORDY, & BOTSFORD, JJ.

IRELAND, J.

We transferred this case from the Appeals Court on our own motion to consider whether a decision of the retirement board of Quincy (board) that the plaintiff's entitlement to a retirement allowance (pension) had been forfeited pursuant to G.L. c. 32, § 15(4), amounted to an excessive fine in violation of the Eighth Amendment to the United States Constitution. Because we conclude that the amount of the plaintiff's pension forfeiture is not excessive, we affirm so much of the District Court judge's ruling as determined that the plaintiff did not meet his burden of establishing that the forfeiture violated his Eighth Amendment rights.

1. *Background and procedure.* We recite the background and lengthy procedural history of this case insofar as relevant here, reserving certain details for our discussion of the issue raised.

The plaintiff, Ralph J. Maher, was employed by the city of Quincy (city) as the chief plumbing and gas inspector. In December, 2001, Maher and another city employee broke into and entered the personnel office at city hall. During the break-in, Maher examined his personnel file and stole a portion of it. He sought to remove documents criticizing his job performance, intending that the absence of such documents might improve his chances for reappointment to his position by the mayor-elect of the city. In January, 2002, he retired from his position for superannuation.

In March, 2002, a grand jury returned three indictments against Maher related to the December, 2001, break-in, to which Maher pleaded guilty in July, 2003: breaking and entering in the daytime with intent to commit a felony, in violation of G.L. c. 266, § 18; stealing in a building, in violation of G.L. c. 266, § 20; and wanton destruction of property, in violation of G.L. c. 266, § 127.[2] Maher was sentenced to six months of unsupervised probation on each conviction, to run concurrently, and was ordered to make restitution of $393 and to pay a fine of $500.

The board instituted proceedings against Maher in August, 2003, and notified him that it would hold a

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[2] Maher pleaded guilty only to so much of the indictment alleging wilful and malicious destruction of property in excess of $250 as charged wanton destruction of property.

hearing to determine whether his convictions required forfeiture of his rights to his retirement allowance pursuant to G.L. c. 32, § 15(4). In December, 2003, after the hearing, the board issued a written decision determining that Maher's convictions involved violation of the laws applicable to his office or position, and therefore, pursuant to G.L. c. 32, § 15(4), he had forfeited his retirement allowance.

Maher then commenced this action with the filing of a petition in the District Court, seeking review of the board's decision.[3] The details of those proceedings are not relevant to our discussion here. The District Court judge affirmed the board's decision, granting its motion for judgment on the pleadings and dismissing Maher's petition. Maher then sought review of the judgment of the District Court by filing an action in the nature of certiorari in the Superior Court, pursuant to G.L. c. 249, § 4.[4] A Superior Court

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[3] General Laws c. 32, § 16(3) (*a*) (2), provides, in pertinent part:

> "[A]ny member who is aggrieved by any action taken or decision of a board ... rendered with reference to his dereliction of duty as set forth in section fifteen, may, within thirty days after the certification of the decision of the board, bring a petition in the district court ... praying that such action and decision be reviewed by the court. After such notice as the court deems necessary, it shall review such action and decision, hear any and all evidence and determine whether such action was justified. If the court finds that such action was justified the decision of the board ... shall be affirmed; otherwise it shall be reversed and of no effect.... The decision of the court shall be final."

[4] Pursuant to G.L. c. 249, § 4, Maher added to his action in the Superior Court the Justices of the Quincy Division of the

judge allowed the board's motion for judgment on the pleadings. Maher appealed.

On appeal, the Appeals Court held, among other things, that the Superior Court judge erred in ruling that, because Maher had not raised before the board the claim that the forfeiture provision of G.L. c. 32, § 15(4), as applied to him, constituted an "excessive fine" prohibited by the Eighth Amendment, he had waived that claim.[5] *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't,* 67 Mass.App.Ct. 612, 621, 855 N.E.2d 1106 (2006). Citing our decision in *MacLean v. State Bd. of Retirement,* 432 Mass. 339, 733 N.E.2d 1053 (2000), the Appeals Court concluded that consideration of Maher's Eighth Amendment claim would require additional fact finding, in order to determine whether Maher's pension forfeiture was grossly disproportional to the gravity of the crimes of which he had been convicted. *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't, supra* at 620, 855 N.E.2d 1106. The Appeals Court vacated the judgment of the Superior Court and remanded the case to the District Court for consideration of Maher's Eighth Amendment claim. *Id.* at 621, 855 N.E.2d 1106.[6]

District Court Department as nominal defendants. See note 1, *supra*.

[5] The Appeals Court also concluded that the board properly determined that Maher's convictions involved violation of the laws applicable to his position, G.L. c. 32, § 15(4), and that a board member did not err in refusing to recuse himself from the board proceedings. *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't,* 67 Mass.App.Ct. 612, 621, 855 N.E.2d 1106 (2006).

[6] We denied Maher's application for further appellate review. *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't,* 448 Mass. 1105, 861 N.E.2d 29 (2007).

On remand, the District Court judge issued a written decision in which he made additional findings and concluded that the forfeiture did not violate Maher's Eighth Amendment rights. The District Court judge did not direct the entry of judgment following his decision; instead, the judge purported to report two questions of law to the Appeals Court.[7] We transferred the case from the Appeals Court on our own motion.[8]

[1] 2. *Discussion.* a. *Propriety of report.* As a threshold matter, we consider an issue not addressed by either party: the propriety of the report on which this case comes before us. No statute or rule authorizes a District Court judge, in a civil action, to report a case or a ruling to the Appeals Court. The judge improperly reported his decision in this case to the Appeals Court; it would have been proper for the judge to report his decision to the Appellate Division of the District Court. See G.L. c. 231, § 108 providing that District Court judge may report case, after decision, to Appellate Division). See also Mass. R. Civ. P. 64(b), as appearing in 423 Mass. 1410 (1996)

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[7] The District Court judge purported to report the following questions:

> "1. Does a forfeiture of a pension, pursuant to G.L. c. 32, § 15(4), implicate the Excessive Fines Clause of the Eighth Amendment to the United States Constitution?
>
> "2. If the Excessive Fines Clause is implicated, on the facts of this case, has Maher failed to meet his burden of demonstrating the forfeiture of his pension constitutes an Excessive Fine?"

[8] We acknowledge the amicus brief filed by the Attorney General and the State Board of Retirement.

(report by District Court judge of case or ruling to Appellate Division governed by Rule 5 of Dist./Mun. Cts. Rules for Appellate Division Appeal [2008]). Cf. Mass. R. Civ. P. 64(a), as appearing in 423 Mass. 1410 (1996) (authorizing trial court judge *other* than District Court judge to report case to Appeals Court after verdict or findings of fact, or to report case without decision where parties agree to all material facts and request report of case, or to report propriety of interlocutory finding or ruling).

[2] Where a report is not properly before us, we ordinarily discharge it and decline to decide the case. See, e.g., *Heck v. Commonwealth,* 397 Mass. 336, 338-339, 491 N.E.2d 613 (1986). Because of the particular circumstances of this case, however, we exercise our power of general superintendence, G.L. c. 211, § 3, and decide the issue presented.

[3] Here, the Appeals Court vacated the judgment of the Superior Court in Maher's certiorari action, and remanded this case to the District Court for further consideration of the Eighth Amendment claim. General Laws c. 32, § 16(3) (*a*) (2), expressly provides that "the decision of the [District] [C]ourt [in reviewing the board's decision] shall be final." See note 3, *supra.* "[C]ertiorari is the only way of reviewing decisions declared final by statute." *Doherty v. Retirement Bd. of Medford,* 425 Mass. 130, 134, 680 N.E.2d 45 (1997), quoting *MacKenzie v. School Comm. of Ipswich,* 342 Mass. 612, 614, 174 N.E.2d 657 (1961). See *State Bd. of Retirement v. Bulger,* 446 Mass. 169, 173, 843 N.E.2d 603 (2006) (G.L. c. 249, § 4, provides limited judicial review in nature of certiorari to correct errors of law in administrative proceedings where judicial review otherwise unavailable).

[4] Were we to discharge, as improper, the report in this case, the procedural avenue for the parties to obtain further review following the entry of judgment in the District Court would be the filing of a new certiorari action in the Superior Court. An appeal from a subsequent judgment of the Superior Court would then present an appellate court with the same question to be decided here. Maher's Eighth Amendment claim is the only issue in this case that remains subject to appeal. Requiring the parties at this stage to exhaust the proper procedural route to obtain review of this case would not serve the interests of judicial economy.[9]

[5][6][7][8] b. *Excessiveness of fine.* Maher argues that the District Court judge erred in concluding that he had not met his burden of proving that the forfeiture violated the Eighth Amendment. The Eighth Amendment, applicable to the States through the due process clause of the Fourteenth Amendment to the United States Constitution, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-434, 121 S.Ct. 1678, 149 L.Ed.2d 674 (2001), citing *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), provides:

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[9] The judge's report, although referring to his decision, nonetheless takes the form of two questions of law. "Although a judge may report specific questions of law in connection with an interlocutory finding or order, the basic issue to be reported is the correctness of [the] finding or order. Reported questions need not be answered in this circumstance except to the extent that it is necessary to do so in resolving the basic issue." *McStowe v. Bornstein*, 377 Mass. 804, 805 n. 2, 388 N.E.2d 674 (1979). We therefore disregard the questions posed by the judge and evaluate the propriety of the ruling. *Barnes v. Metropolitan Hous. Assistance Program*, 425 Mass. 79, 84, 679 N.E.2d 545 (1997).

"Excessive bail shall not be required, nor excessive fines imposed, or cruel and unusual punishments inflicted." The excessive fines clause of the Eighth Amendment "limits the government's power to extract payments, whether in cash or in kind, 'as punishment for some offense.'" *United States v. Bajakajian,* 524 U.S. 321, 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), quoting *Austin v. United States,* 509 U.S. 602, 609-610, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993). "Forfeitures-payments in kind-are thus 'fines' if they constitute punishment for an offense." *United States v. Bajakajian, supra.* "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *Id.* at 334, 118 S.Ct. 2028. A court reviewing the proportionality of a forfeiture therefore compares the amount of the forfeiture to the gravity of the underlying offense that triggered it. *Id.* at 336-337, 118 S.Ct. 2028. "If the amount of the forfeiture is grossly disproportional to the gravity of the [triggering] offense, it is unconstitutional." *Id.* at 337, 118 S.Ct. 2028.

[9][10] For purposes of this appeal, we assume, without deciding, that (as Maher argues) the District Court judge correctly ruled that the excessive fines clause applies to the pension forfeiture provision of G.L. c. 32, § 15(4). See *MacLean v. State Bd. of Retirement,* 432 Mass. 339, 346, 733 N.E.2d 1053 (2000) (assuming, without deciding, pension forfeiture required by G.L. c. 32, § 15[4], amounts to punishment and therefore constitutes "fine"). Therefore, we turn to Maher's argument that the District Court judge erred in concluding that Maher had not met his burden of establishing that the

forfeiture of his pension was excessive. The judge found that the total amount that Maher forfeited would be approximately $576,000.[10] A party challenging the constitutionality of a forfeiture as being excessive bears the burden of demonstrating excessiveness. *Id.* at 347, 733 N.E.2d 1053, citing *United States v. Ahmad,* 213 F.3d 805, 816 (4th Cir.2000). We review the proportionality determination made by the District Court judge de novo, see *United States v. Bajakajian, supra* at 336, 118 S.Ct. 2028, and, as mentioned, we determine whether the forfeiture was excessive by drawing the constitutionally required comparison between the magnitude of the forfeiture required by the statute and the gravity of the triggering offenses. See *United States v. Bajakajian, supra* at 336-337, 118 S.Ct. 2028.

[11] In evaluating the gravity of the underlying offenses that triggered the forfeiture of Maher's pension pursuant to G.L. c. 32, § 15(4), we gauge the degree of Maher's culpability and consider the harm caused by the underlying offenses. *Id.* at 338-340, 118 S.Ct. 2028. To gauge the degree of Maher's culpability, we look to, among other things, the nature and circumstances of his offenses, e.g., whether there was a relationship between the crimes that triggered the forfeiture and any other illegal activities, as well as to the maximum penalties authorized by the Legislature as punishment for his offenses. See *id.* at 337-339, 118 S.Ct. 2028. See also *MacLean v. State Bd. of Retirement, supra* at 346, 733 N.E.2d 1053.

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[10] Maher conceded the accuracy of this amount at oral argument.

[12] By any measure, the crimes to which Maher pleaded guilty are serious in nature.[11] "The offense of breaking and entering in the daytime [in violation of G.L. c. 266, § 18,] falls within the definition of a felony." *Commonwealth v. Soares,* 51 Mass.App.Ct. 273, 277 n. 5, 745 N.E.2d 362 (2001), citing *Commonwealth v. Sheeran,* 370 Mass. 82, 88, 345 N.E.2d 362 (1976). "[L]arceny in a building [in violation of G.L. c. 266, § 20,] is a felony regardless of the value of the items stolen." *Commonwealth v. Cruz,* 430 Mass. 182, 188, 714 N.E.2d 813 (1999), citing *Commonwealth v. Ronchetti,* 333 Mass. 78, 82, 128 N.E.2d 334 (1955).

In addition, the Legislature has authorized the following maximum penalties as punishment for the crimes to which Maher pleaded guilty: (1) breaking and entering into a building in the daytime with intent to commit a felony, in violation of G.L. c. 266,

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[11] Maher argues that our analysis should take into account the lack of a nexus between the crimes to which he pleaded guilty and his entitlement to receive a pension. This contention is unavailing. The District Court judge found that Maher intended through his unlawful acts to secure continued employment by means of fraud, i.e., depriving the incoming mayor of information appearing within Maher's personnel record that would have tended to show that Maher was not a suitable candidate for reappointment to his position. If Maher had succeeded, he would have gained fraudulently obtained income and increased pension benefits. To the extent that Maher's argument goes to the question whether his convictions involved violation of laws applicable to his position, that question is not before us. That determination was made by the board in the first instance, upheld by the District Court and the Superior Court, and affirmed by the Appeals Court. *Maher v. Justices of the Quincy Div. of the Dist. Court Dep't,* 67 Mass.App.Ct. 612, 621, 855 N.E.2d 1106 (2006), *S.C.,* 448 Mass. 1105, 861 N.E.2d 29 (2007) (further appellate review denied).

§ 18, is punishable by a maximum sentence of up to ten years in State prison; (2) stealing in a building, in violation of G.L. c. 266, § 20, is punishable by imprisonment in the State prison for up to five years; and (3) wanton destruction of property (the door of the personnel director's office), in violation of G.L. c. 266, § 127, is punishable by imprisonment for up to two and one-half years. These punishments indicate the gravity and seriousness with which the Legislature views these crimes.[12] See *MacLean v. State Bd. of Retirement, supra* at 348, 733 N.E.2d 1053. See also *United States v. Bajakajian, supra* at 336, 118 S.Ct. 2028 (determination of appropriate punishment for offense belongs to Legislature in first instance, and any judicial determination of gravity of criminal offense is inherently imprecise).

Maher argues that the harm he caused was minimal, where he acquired no financial gain from his actions, and where (as he argues) the only pecuniary loss to the city was the cost of repairing the office door damaged during the break in. We disagree. It is immaterial that Maher did not achieve the goal of his criminal enterprise, which was fraudulently to secure continued employment through reappointment to his position. The District Court judge found that had Maher succeeded in obtaining reappointment, he stood to gain approximately $125,000 in salary during the two-year term of the incoming mayor. Furthermore, we view the potential

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[12] Maher contends that we should consider the relative leniency of the sentence he received in our assessment of his degree of culpability. The sentence imposed as punishment for conviction of a particular offense, however, does not control our analysis; rather, the maximum punishment authorized by the Legislature is the determinative factor. See *MacLean v. State Bd. of Retirement, supra* at 348, 733 N.E.2d 1053.

harm to the public trust caused by Maher's actions as equally important to our analysis as any potential harm his actions might have caused to the public fisc. The District Court judge concluded that Maher's crimes could have undermined public confidence in the selection and appointment of officials to supervisory positions. We agree.

Comparing the total amount of the forfeiture of Maher's pension, approximately $576,000, to the gravity of the underlying offenses to which he pleaded guilty, we cannot say that the forfeiture is grossly disproportional. See *MacLean v. State Bd. of Retirement, supra* at 350, 733 N.E.2d 1053 (forfeiture of pension totaling approximately $625,000 not excessive where former State employee pleaded guilty to two misdemeanor violations of G.L. c. 268A, § 7, the conflict of interest statute). There was no error.

3. *Conclusion.* For the reasons stated above, we affirm so much of the District Court judge's ruling as determined that the plaintiff did not meet his burden of establishing that the forfeiture violates his Eighth Amendment rights. The case is remanded to the District Court where judgment shall enter for the defendants.

So ordered.

Mass.,2008.
Maher v. Retirement Bd. of Quincy
452 Mass. 517, 895 N.E.2d 1284

APPENDIX B

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. TRIAL COURT DEPARTMENT
QUINCY DISTRICT COURT
DOCKET NO. 0456 CV 0196

RALPH J. MAHER

VS.

QUINCY RETIREMENT BOARD

FINDINGS OF FACT
AND
RULINGS OF LAW

Ralph J. Maher (Maher) filed a petition for review, pursuant to G.L. c. 32, § 1 6(3)(a), of the Quincy Retirement Board's (QRB) revocation of his public employee pension benefits under the provisions of G.L. c. 32, § 15(4)[1]. On July 29, 2004, this court issued a decision upholding the revocation.

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[1] G.L. c. 32, § 15(4) provides as follows:

"(4) Forfeiture of pension upon misconduct. -- In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of section one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero."

The court, however, did not address Maher's assertion that the revocation was unconstitutional because it violated the Excessive Fines Clause of the Eighth Amendment. The court determined that the issue was waived because the constitutional claim was not presented before the QRB.

On October 27, 2006, the Appeals Court concluded that the QRB properly applied the provisions of G.L. c. 32, § 15(4). Yet, the Appeals Court, holding that a constitutional claim could not be decided by the QRB, remanded the case for this court's consideration.

Factual background. Maher, on December 15, 2001, was employed as the chief plumbing and gas inspector for the city of Quincy (city). That day, he and another city employee broke into and entered the personnel office at city hall. There, the plaintiff reviewed his personnel file and stole a document or documents from the file. The object of the illegal conduct was to remove documents criticizing his performance as the chief inspector of gas and plumbing to improve his chances of being reappointed by a recently-elected mayor. On January 16, 2002, Maher took superannuation retirement.

On March 8, 2002, a Norfolk County grand jury returned three indictments against Maher in connection with the breaking and entering, On July 24, 2003, Maher pled guilty to the indictments alleging violations of G.L. c. 266, § § 18 (breaking and entering in the daytime with intent to commit a felony) & 20 (stealing personnel records and various documents) and as to the indictment brought under G.L. c. 266, § 127 he pled guilty to so much of that

indictment which alleged wanton destruction of property, a door to the personnel office. Maher was placed on unsupervised probation for six months on each indictment, ordered to make a restitution payment of $393.00 for the damage to the door and fined $500.00.

Pursuant to the provisions of G.L. c. 32, § 15(2) & 15(4), the QRB initiated proceedings to determine whether Maher was entitled to continue receiving pension benefits because of the connection of the criminal activity, for which he was convicted, and the position he occupied within the city's employment. On December 31, 2003, the QRB revoked Maher's pension.

At the time of Maher's retirement, Maher's creditable service entitled him to receive an annual pension of $37,145.76. At the time of his retirement, Maher, then sixty-four years of age[2], had a life expectancy of 15.62 years. At the time of his pension revocation, Maher had a life expectancy of approximately 14.5 years. Thus, after subtracting the $65,164.82 in contributions made by Maher during his employment which he is entitled to have returned, without interest, Maher will sustain a loss of $473,449.70. Between the date of his conviction and the date of revocation, Maher received $13,359.55 in benefits which the city, correctly arguing that Marher's pension was forfeited on the date of his conviction by operation of law, argues it is entitled to recoup. If this amount is added to the previous figure, then Maher stands to lose $486,809.25 in pension benefits, Added to this figure

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[2] Maher turned 64 on December 31, 2001, and retired 17 days later.

is approximately $90,000.00 in lost health care coverage costs[3]. The total forfeiture, therefore, approximates $576,000.00.

1. The Appeals Court, in its discussion of the duty of a court rather than an administrative agency to rule upon constitutional issues, noted that the duty "is particularly true here given the novelty of Eighth Amendment excessive fine claims, the scarcity of precedent, the importance of pension rights, and the potential widespread applicability of the forfeiture provision." The court, therefore, begins, as it should, with a discussion of the Eighth Amendment[4].

It is not at all certain that the Eighth Amendment is implicated. In discussing, generally, the history of the Eighth Amendment, the Supreme Court has observed that the adoption of the language of the amendment was brought about by "fear[] [of] the imposition of torture and other cruel punishments not only by judges acting beyond their lawful authority, but also by legislatures engaged in making the laws by which judicial authority would be measured." *Ingraham v. Wright*, 430 US 651, 665 (1977). The Court also commented that the subject to

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[3] This figure is not adjusted for any increased costs during Maher's life expectancy. It is derived from the projected total annual cost of health coverage minus Maher's required annual contribution. In other words, this figure represents the projected cost to the city for Maher's health coverage based upon figures available at the time of Maher's retirement..

[4] It appears that the United States Supreme Court has not decided whether the Excessive Fines Clause is at all applicable to the States through the Fourteenth Amendment. *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 US 257, 276 n. 22 (1989).

which the Eighth Amendment was to apply was "criminal process." *Id.* at 666. Later, in *Browning-Ferris v. Kelco Disposal*, 492 US 257 (1989), the Court, holding that the Excessive Fines Clause would not apply in the context of a private civil suit in which the government was not involved, did state that because of its holding it need not decide whether the Excessive Fines Clause would apply only to criminal proceedings. It did, however, note that "[b]ail, fines, and punishment traditionally have been associated with criminal process, and by subjecting the three to parallel limitations the text of the Amendment suggests an intention to limit the power of those entrusted with the criminal law function of government." *Id.* at 263, quoting *Ingraham* at 664. Four years later, in *Austin v. United States*, 509 US 602 (1993), the Court, in addressing the issue of forfeiture again within the context of a court proceeding, held that the Excessive Fines Clause is not limited to criminal prosecutions. In holding that the Amendment did not require such limitation, the Court noted the absence of any limitation by language in the Amendment and compared it to the Fifth and Sixth Amendments which each ties directly to criminal prosecutions. Whatever the evolution of Eighth Amendment jurisprudence, the underlying context in which it has been addressed culminated in judicial action and it is that action from which an examination into the Excessive Fines Clause arose. In contrast, a pension forfeiture[5] "under 'G.L. c. 32, § 15(4), is mandatory and occurs by operation of law.... [It] is an automatic legal consequence of conviction of certain offenses.'

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[5] The court, here, assumes that a pension forfeiture falls within the meaning of a "forfeiture" as the Supreme Court has used it.

State Bd Of Retirement v. Woodward, 446 Mass. 698, 705 (2006), quoting *MacLean v. State Bd. of Retirement*, 432 Mass. 339, 342-343 (2000). No judicial action is directly involved[6].

Although in the abstract, forfeiture is self-executing, except for the QRB's "ministerial step to effectuate formally what already has occurred by operation of law," *Woodward, supra* at 705, and is not dependent upon judicial involvement, forfeiture does occur at the moment of conviction. Forfeiture is inextricably tied to an adjudication of a court and flows from that adjudication. In this court view, assuming some judicial involvement is necessary, the nexus is present.

But, even if this assertion is incorrect, it is recalled that, in adopting the Eighth Amendment motivation included a concern with the legislative power to make the laws that place measures upon courts. *Ingraham* at 665. To allow a legislature to declare what and how much is forfeited by "operation of law," without constitutional check, simply because it has chosen a policy that averts direct judicial involvement, seems to allow a legislative branch to avoid a chief concern for the adoption of the Eighth Amendment.

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[6] The court notes that Art. 26 of the Massachusetts Declaration of Rights states, in part, that "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments." It appears that under our state constitution, judicial or some quasi-judicial involvement is required. And, Art. 26 appears to be concerned with criminal prosecutions. In any event, Art. 26 has not been raised by Maher.

Notwithstanding the lack of a direct judicial link to the issue of pension forfeiture, the court does not believe it to be a bar to the application of the Amendment at issue.

Beyond the linkage that the court has addressed, it is still to be determined whether a pension forfeiture falls within the definition of a "fine" as used in the text of the Amendment. In *United States v. Bajakajian*, 524 US 321 (1998), the Court stated that it "has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause. We have, however, explained that at the time the Constitution was adopted, 'the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.'... The Excessive Fines Clause thus 'limits the government's power to extract payments, whether in cash or kind, "as punishment for some offense."'... Forfeitures — payments in kind — are thus 'fines' if they constitute punishment for an offense." *Id.* at 327.

It is plainly clear that the forfeiture of a pension is a form of "punishment for an offense." *Id.* Pursuant to G.L. c. 32, § 15(4) the loss of the pension is predicated upon the public employee having committed a "criminal offense involving violation of the laws applicable to his office or position." Although the pension forfeiture statute presumably promotes allegiance to the public trust, it also serves a punitive purpose. It punishes those who breach the trust by committing a "criminal offense involving violation of the laws applicable to his office or position." The punishment aspect is not of a distant connection, as suggested by the defendant, it is immediately apparent and intended to be part of the

statute. Because it is in large measure punitive, pension forfeiture is brought "within the purview of the Excessive Fines Clause." *Bajakajian, supra* at 329, n.4.

2. The court next addresses whether the forfeiture is excessive. Though recognizing proportionality as a measure of excessiveness, the Court in *Bajakajian*, supra, in the absence of authority on "how disproportional to the gravity of an offense a fine must be in order to be deemed constitutionally defective," *id.* at 336, adopted "the standard of gross disproportionally." *Id.* In applying this standard, the court is to look at whether "the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense." *Id.* at 337. The factors included in the examination are "the gravity of the offense, the maximum penalties, whether the violation was related to any other illegal activities, and the harm resulting from the crime." *MacLean v. State Bd. of Retirement*, 432 Mass. 339, 346 (2000), citing *Bajakajian, supra* at 338-340. The degree to which the public is harmed and whether the criminal actions were an attempt to enact a fraud upon the government are also factors that bear upon the fourth factor. *Id.* at 347.

Maher argues that for twenty-six years and five months he served as a public employee and earned his pension which the court has valued at $576,000.00. He urges the court to focus on the probationary disposition, a fine of $500.00, and an order of restitution of $393.00 that was imposed upon him as a result of his plea to the criminal charges. When compared by Maher's reasoning, there is a degree of excessiveness in the forfeiture.

But, the argument, in this court's view, misses what is important.

Maher's most serious offense carried with it a potential imprisonment sentence of ten years. That sentence potential itself demonstrates the level of how the legislature viewed the harm attributable to the crime which, of course, was committed against the City of Quincy. Further, the restitution figure should not define the measure of harm. Maher attempted to secure continued employment by fraud. He sought to gain, through fraud, a potential public payout of between $125,000.00-$1,000,000.00[7]. Had he been successful, his criminal action, would also have undermined the confidence in competency that an appointing official, acting on behalf of the public, is deserving of in the selection of a candidate to fill a public supervisory position.

In the end, it is the legislature who in the "first instance" determines punishment, *MacLean v. State Bd. of Retirement*, 432 Mass. 339, 346 (2000), including collateral consequence of the conviction. The petitioner bears the burden of proof and, in this case, he has not established his burden.

June 25, 2007

/s/ Mark S. Coven, Justice
Mark S. Coven, Justice

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[7] Maher's actions indicate his desire to continue employment. These figures represent the approximate amount of income Maher potentially would have earned if he remained, at a minimum, through the first term of the new mayor or, at a maximum, until his life expectancy.

APPENDIX C

Appeals Court of Massachusetts, Norfolk.
Ralph MAHER
v.
JUSTICES OF The QUINCY DIVISION OF The DISTRICT COURT DEPARTMENT & another.[1]

No. 05-P-1785.

Argued Sept. 14, 2006.
Decided Oct. 27, 2006.

Background: City employee, the chief plumbing and gas inspector, sought judicial review of decision of city retirement board, requiring forfeiture of retirement allowance on grounds that employee committed a criminal offense involving violation of laws applicable to his office or position. The District Court dismissed petition. Employee sought certiorari review. The Superior Court Department, Norfolk County, Barbara A. Dortch-Okara, J., entered judgment on the pleadings in favor of retirement board. Employee appealed.

Holdings: The Appeals Court, Kafker, J., held that:
(1) employee's convictions involving breaking and entering into city hall personnel office and stealing personnel records were violations of law applicable to his position;
(2) retirement board member was not required to recuse himself; but
(3) employee's failure to raise Eighth Amendment excessive fine claim before retirement board did not waive issue for purposes of judicial review.

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[1] Retirement board of Quincy.

Vacated and remanded.

Frank J. McGee for the plaintiff.

Michael Sacco for retirement board of Quincy.

Jonathan C. Green & Monica E. Conyngham, for city of Quincy, amicus curiae, submitted a brief.

Present: DOERFER, KAFKER, & MILLS, JJ.

KAFKER, J.

The first question we must decide is whether the retirement board of Quincy (board) properly required the plaintiff, Ralph Maher, to forfeit his retirement allowance pursuant to G.L. c. 32, § 15(4), which provides that no member of a public employee retirement system shall be entitled to a retirement allowance after conviction of a criminal offense involving violation of the laws applicable to his office or position. If the board correctly interpreted G.L. c. 32, § 15(4), the second question we must decide is whether the plaintiff waived his challenge based on the Eighth Amendment to the United States Constitution, that the forfeiture constituted an excessive fine, by failing to raise this constitutional claim before the board.

Background. On December 15, 2001, while the plaintiff was employed as the chief plumbing and gas inspector for the city of Quincy (city), he and another city employee broke into and entered the personnel office at city hall. There, the plaintiff reviewed his personnel file and stole a document or documents from the file. A few weeks later, a new mayor took office. On January 16, 2002, the plaintiff took superannuation retirement. On July 24, 2003, the

plaintiff entered pleas of guilty on indictments charging him with violations of G.L. c. 266, § 18 (breaking and entering in the daytime with intent to commit a felony); G.L. c. 266, § 127 (wanton destruction of property, a door to the personnel office); and G.L. c. 266, § 20 (stealing personnel records and various documents). The plaintiff was sentenced to concurrent terms of six months unsupervised probation on each conviction and was ordered to make restitution of $393 and to pay a fine of $500.

After the plaintiff had pleaded guilty to the offenses related to the break-in at city hall, the city initiated proceedings against the plaintiff pursuant to G.L. c. 32, § 15(2) and (4), to determine whether the plaintiff's convictions "involv[ed] violation of the laws applicable to his office or position" and would therefore require forfeiture of his retirement allowance. The board held a hearing, at which the evidence presented included the defendant's guilty pleas and the change of plea colloquy from the Superior Court. During the colloquy, the plaintiff had admitted that he "stole personnel records and documents, the property of the City of Quincy, from the Office of the Personnel Director."[2] The former personnel director also had testified that after conducting "a thorough search of his office, the only

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[2] His counsel also confirmed that the plaintiff took a portion of his personnel file. Counsel further elaborated that the plaintiff went to city hall with the intention of looking at his personnel file "and if ... certain things were in there that he believed were inappropriate, taking them." Although not referenced in the board's decision, counsel at the plea hearing stated further that the plaintiff was looking for letters prepared by the plaintiff's superior that were highly critical of the plaintiff and accused him of numerous improprieties.

missing property was one of two personnel folders kept on [the plaintiff]."

At the hearing before the board, the plaintiff's counsel argued that unless the board could prove what was taken from the plaintiff's personnel file, it could not find that the criminal offenses were a violation of the laws applicable to the plaintiff's office or position. Although it rejected this contention, the board placed the plaintiff under oath and asked him to clarify for the board what was taken from his file. He refused, and the board found it reasonable to infer from his refusal to testify that his testimony would have been against his interest.[3] Based on all the evidence, the board further determined that "[g]iven that Mayor Sheets had recently been defeated in the City of Quincy mayoral election, and [the plaintiff's] appointment as Chief Plumbing and Gas Inspector would rest in the hands of the new mayor, it is reasonable for this Board to conclude that Maher broke into the Office of the City of Quincy's Personnel Director for the sole purpose of removing unflattering and/or critical documents from his personnel file which could compromise his reappointment by the new mayor."[4]

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[3] The plaintiff also contended that the board could have determined what was in his personnel file by contacting the United States Attorney's office. Prior to December 15, 2001, the United States Attorney's office had subpoenaed the plaintiff's personnel file. The board requested the city solicitor to contact the United States Attorney's office, but he reported back that he was "unable to obtain a complete copy of the personnel file as it existed prior to the December 15, 2001 break in."

[4] The board additionally found that the plaintiff sought to cover up the break-in by having a locksmith who routinely performed service for the city repair the broken door.

The board concluded that there was "clearly ... a link between [the plaintiff's] official duties and his criminal convictions." Had the plaintiff "broke[n] into a private residence ... it is likely that his retirement allowance would not be revoked; however, in this case, but for the fact that he was the Chief Plumbing and Gas Inspector for the City of Quincy, he would not have had cause to break into the Personnel Director's office, and steal his personnel file." The board held that both the larceny and the breaking and entering convictions were violations of the laws applicable to the plaintiff's office or position, thereby requiring forfeiture of the plaintiff's retirement allowance.

Thereafter the plaintiff sought judicial review in the District Court pursuant to G.L. c. 32, § 16(3), where, after hearing, a District Court judge found the board's decision justified, including the forfeiture of the plaintiff's pension, and dismissed the petition.[5] The plaintiff then commenced an action in the nature of certiorari in the Superior Court.[6] A Superior Court judge allowed the board's motion for

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[5] The judge did, however, exclude all consideration of the testimony regarding the locksmith, who was not subject to cross-examination. We do the same.

[6] General Laws c. 249, § 4, as amended by St.1973, c. 1114, § 289, provides, in pertinent part, that "[a] civil action in the nature of certiorari to correct errors in proceedings which are not according to the course of the common law, which proceedings are not otherwise reviewable by motion or by appeal, may be brought in the supreme judicial or superior court...." See *Doherty v. Retirement Bd. of Medford,* 425 Mass. 130, 134, 680 N.E.2d 45 (1997) (a case following the same procedural path as this one, from the retirement board to the District Court pursuant to G.L. c. 32, § 16[3][*a*], to the Superior Court pursuant to G.L. c. 249, § 4).

judgment on the pleadings, ruling that (1) the plaintiff's convictions were for criminal offenses "involving violation of the laws applicable to his office or position" under G.L. c. 32, § 15(4); (2) there was no error in the refusal of board member Francis X. McCauley, a former mayor of the city, to recuse himself from participating in the forfeiture hearing; (3) the court need not reach the plaintiff's claim that forfeiture of his pension constitutes a violation of the Eighth Amendment to the United States Constitution, as that claim was not raised before the board and not considered by the District Court and thus was waived; and (4) there was no error in the introduction before the board of a copy of the city police department file relating to the investigation into the break-in that resulted in the plaintiff's indictments, despite the hearsay it included, as there was substantial evidence to support the board's decision in any event.[7] The plaintiff has appealed, pressing each of the foregoing issues.

Discussion. As provided in G.L. c. 32, § 15(4), as inserted by St.1987, c. 697, § 47, "[i]n no event shall any member [of the retirement system] after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance...." Upon such conviction, § 15(4) further provides that the member "shall receive, unless otherwise prohibited by law, a return of his accumulated total [contributions to the retirement system]; provided, however, that the rate of regular interest for the

[7] The plaintiff raised the same issues with similar briefing in both the District and Superior Courts. With the exception of the Eighth Amendment argument, these issues were also raised before the board.

purpose of calculating accumulated total [contributions] shall be zero."

The Supreme Judicial Court has stated that "[t]he substantive touchstone intended by the General Court is criminal activity connected with the office or position." *Gaffney v. Contributory Retirement Appeal Bd.*, 423 Mass. 1, 4, 665 N.E.2d 998 (1996). See *State Bd. of Retirement v. Bulger*, 446 Mass. 169, 174-175, 843 N.E.2d 603 (2006). This does not mean that the crime itself must reference public employment or the employee's particular position or responsibilities. *Gaffney v. Contributory Retirement Appeal Bd., supra* at 3-4, 665 N.E.2d 998. Rather, it means that the violations must be "related to the member's official capacity." *Id.* at 5, 665 N.E.2d 998. We therefore "[l]ook[ ] to the facts of each case for a direct link between the criminal offense and the member's office or position." *Ibid.*

[1] There are multiple, direct links between the criminal offenses here and the plaintiff's office or position. He broke and entered into the city's personnel office. He stole documents from his personnel file. His object was to remove documents criticizing his performance as the chief inspector of gas and plumbing to improve his chances of being reappointed by a recently-elected mayor.[8] There was also substantial evidence to support all the board's findings given the plaintiff's guilty pleas, the statements made during the plea colloquy, the

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[8] We note that the plaintiff was entitled to view the contents of his personnel file pursuant to G.L. c. 149, § 52C, and to submit a written statement, for inclusion in his personnel file, explaining his disagreement with anything contained in the file.

testimony provided by former city personnel director Kevin Madden, the timing of the break-in shortly before a new mayor would take office, and the reasonable inferences that could be drawn from the plaintiff's refusal to testify at the board hearing. See *Doherty v. Retirement Bd. of Medford,* 425 Mass. 130, 138, 680 N.E.2d 45 (1997) (applying the substantial evidence standard of review to a retirement board decision appealed pursuant to G.L. c. 32, § 16[3][*a*], and G.L. c. 249, § 4).[9]

[2] We likewise discern no merit in the plaintiff's argument that board member Francis McCauley was required to recuse himself. The plaintiff, without supporting authority, contends that McCauley should have recused himself. McCauley had previously served as mayor of the city and during such term the plaintiff was fired and then eventually reinstated by the civil service commission. The plaintiff contends that this raises at least the appearance of bias. In declining to recuse himself, McCauley "absolutely" denied any actual bias and stated that the firing was done not by him but by the plaintiff's manager. We also emphasize that the board consisted of five persons. In these circumstances, we conclude that the alleged "bias is itself speculative, and the prospect of any such bias influencing the decision making of other board members is implausible." *Varga v. Board of*

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[9] As there is ample evidence to support the board's finding in this regard, we consider the plaintiff's objections to the admission of other evidence to be irrelevant. Furthermore, the plaintiff's argument in this regard, presented in an unsupported paragraph, and sometimes referring to exhibit 7 and other times referring to exhibit 8, does not rise to the level of appropriate appellate argument. See Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975).

Registration of Chiropractors, 411 Mass. 302, 307, 582 N.E.2d 492 (1991).

[3] Finally, we address the plaintiff's Eighth Amendment claim. The plaintiff contends that the automatic forfeiture provision of G.L. c. 32, § 15(4), as applied to him in these circumstances, would constitute an "excessive fine" as prohibited by the Eighth Amendment to the United States Constitution. The issue was not, however, raised before the board. When it was presented to the District Court, the judge concluded that the plaintiff "did not offer into evidence before the [board] any factual support for his claim that forfeiture of his pension benefits would violate the Eight [h] Amendment. Limited to the [board] record, ... the court declines to consider this argument." Upon certiorari review, the Superior Court judge concluded that the issue was not properly before the court and was therefore waived "as it was not raised with the Retirement Board and was not considered by the District Court."

The plaintiff argues, however, that the District and Superior Court judges erred in considering the record closed and the issue waived because the board had no jurisdiction over constitutional questions; therefore, the plaintiff was not required to bring his constitutional challenge to the board first. Furthermore, the plaintiff submitted an affidavit in the District Court that provided a factual basis for determining his monthly retirement allowance prior to the forfeiture ($2,866.67) and the monthly health care premium he was required to pay for himself and his wife prior to the forfeiture ($600) and afterwards ($1,403.08), thereby allowing calculation of the fine. In various memoranda submitted to the District

Court, he also presented legal arguments for why the forfeiture constituted an excessive fine.[10]

Our analysis of the Eighth Amendment claim begins with a recognition that there are exceptions to exhaustion requirements for challenges to the constitutionality of administrative statutes, particularly those that present pure questions of constitutional law or do not require expert fact finding by administrative agencies. See, e.g., *Gurry v. Board of Public Accountancy,* 394 Mass. 118, 126, 474 N.E.2d 1085 (1985) ("Except for jurisdictional claims based upon constitutional challenges to an agency's enabling legislation, litigants involved in adjudicatory proceedings should raise all claims before the agency, including those which are constitutionally based"); *Hartford Acc. & Indem. Co. v. Commissioner of Ins.,* 407 Mass. 23, 28-29, 551 N.E.2d 502 (1990) ("as applied" challenge to the constitutionality of an insurance statute need not be presented to an administrative agency); *Liability Investigative Fund Effort, Inc. v. Medical Malpractice Joint Underwriting Assn.,* 409 Mass. 734, 747, 569 N.E.2d 797 (1991) (no exhaustion requirement for a constitutional challenge, particularly where there was no specialized fact finding required).[11]

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[10] We note, however, that the plaintiff did not expressly plead the Eighth Amendment claim in the complaint he filed in District Court.

[11] This is not a case where the constitutional claims have been brought prematurely or unnecessarily. "The Court will not pass upon a constitutional question ... if there is also present some other ground upon which the case may be disposed of." *Ashwander v. Tennessee Valley Authy.,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936). Here all other issues were presented to and decided by the board, leaving only the

The board clearly had no jurisdiction to decide the constitutionality of the forfeiture provision as applied to the plaintiff. See *ibid.*; 2 Pierce, Administrative Law § 15.5, at 1004 (4th ed.2002) ("agencies lack the power to hold statutory provisions unconstitutional"). It is for the courts, not administrative agencies, to decide the constitutionality of statutes. Moreover, the determination of the constitutionality of a statute as applied can be one of the most difficult and sensitive tasks performed by the judiciary. This is particularly true here given the novelty of Eighth Amendment excessive fine claims,[12] the scarcity of precedent, the importance of pension rights, and the potential widespread applicability of the forfeiture provision. Recognizing this limitation on their jurisdiction, retirement boards have declined to consider constitutional challenges to G.L. c. 32, § 15, forfeitures. See *Doherty v. Retirement Bd. of Medford,* 425 Mass. at 133, 680 N.E.2d 45; *MacLean v. State Bd. of Retirement,* 432 Mass. 339, 352, 733 N.E.2d 1053 n. 16 (2000).

Although an agency cannot decide an ultimate constitutional issue, the question remains whether such an issue must nonetheless be brought before it to inform the agency's resolution of the statutory and regulatory questions it must consider and to draw on its specialized expertise for necessary fact finding. In

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constitutionality of the statute as applied to the plaintiff outstanding.

[12] In 1998, in *United States v. Bajakajian,* 524 U.S. 321, 327, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998), the United States Supreme Court stated, "This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause [of the Eighth Amendment]."

the instant case, for example, the board, had it been so informed, would have been made sensitive, if it were not already, to the need to interpret statutes to avoid constitutional problems. Nevertheless, the legal issue before the board-whether the convictions were for offenses involving the plaintiff's office or position-was quite distinct from whether the forfeiture was an Eighth Amendment violation. Given this clear distinction, the multiple direct links between the crimes and the plaintiff's office, and the automatic nature of the forfeiture provision, we discern no basis for concluding that the failure to alert the board about the Eighth Amendment argument would have altered the board's analysis of the other issues within its jurisdiction.

We also conclude that the fact finding required to resolve the Eighth Amendment issue does not involve specialized expertise. In determining whether a pension forfeiture is an excessive fine, the Supreme Judicial Court has calculated the lost benefits and the ill-gotten gains to determine whether the punishment is "grossly disproportional."[13] *MacLean v. State Bd. of Retirement,* 432 Mass. at 346, 733 N.E.2d 1053,

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[13] The Supreme Judicial Court has done so after assuming but not deciding that a forfeiture was a fine and punitive. See *MacLean v. State Bd. of Retirement,* 432 Mass. at 346, 733 N.E.2d 1053. Guidance on these threshold issues has been provided in *United States v. Bajakajian,* 524 U.S. at 327, 118 S.Ct. 2028, where the United States Supreme Court concluded that "the word 'fine' was understood to mean payment to a sovereign as punishment for some offense." The Court also concluded that the forfeiture of currency ordered for violation of a statute prohibiting the currency's removal from the United States, in violation of a reporting requirement, constituted punishment. *Id.* at 328, 118 S.Ct. 2028.

quoting from *United States v. Bajakajian,* 524 U.S. 321, 334, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). [14] This requires determining the value of the lost pension benefits after subtracting the returned contributions.[15] It would also require an understanding of the value of continued employment to the plaintiff, at least in terms of salary and increased pension benefits. The "gravity of the offense, ... whether the violation was related to any other illegal activities, and the harm resulting from the crime" must also be considered. *MacLean v. State Bd. of Retirement, supra.* Although the board could have been helpful in developing some of the underlying facts, most of these facts are not within the special expertise of a retirement board. Rather, they involve the type of fact finding ordinarily undertaken by the courts.[16]

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[14] To do so, the Supreme Judicial Court has stated that "[i]n any forfeiture case it would be helpful for the judge to make a finding of the total value of the forfeiture involved." *MacLean v. State Bd. of Retirement,* 432 Mass. at 348 n. 11, 733 N.E.2d 1053.

[15] The plaintiff submitted an affidavit and life expectancy table to calculate the value of the lost pension benefits. The record does not contain the amount of the returned contributions.

[16] We note further that G.L. c. 32, § 16(3)(*a*), as amended by St.1982, c. 630, § 21, provides that the District Court shall "review such action and decision, *hear any and all evidence* and determine whether such action was justified" (emphasis added). Although this court has previously noted that the scope of review provided by this language is not clear and that "[t]he reference to 'evidence' in G.L. c. 32, § 16(3), may refer only to evidence of what occurred in the proceedings before the board," this interpretative statement was not made in the context of a constitutional challenge. *MacDonald v. Commissioner of the Metropolitan Dist. Comm.,* 33 Mass.App.Ct. 455, 462, 600 N.E.2d 1020 n. 8 (1992). To decide the Eighth Amendment

In sum, the resolution of the Eighth Amendment as applied challenge to the forfeiture provision in the statute is ultimately and undeniably a core judicial function. It is also outside the jurisdiction and special expertise of the board and separate and apart from the issues the board needs to resolve. Consequently, the failure to raise the issue before the administrative agency cannot result in the closure of the record and the waiver of the constitutional claim. A remand of the Eighth Amendment claim is therefore required.

Conclusion. We conclude that the plaintiff's convictions were for offenses involving violation of the laws applicable to his office or position, and that there was no error in the refusal of board member McCauley to recuse himself from the hearing. However, it was error to deem the Eighth Amendment claim waived. Accordingly, the judgment of the Superior Court is vacated and the case is remanded to the District Court for consideration of the plaintiff's Eighth Amendment claim.

So ordered.

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challenge here, the District Court is entitled to "hear any and all evidence" necessary to make the required factual findings.

APPENDIX D

MASSACHUSETTS GENERAL LAWS

CHAPTER 32. RETIREMENT SYSTEMS AND PENSIONS

Chapter 32: Section 15. Dereliction of duty by members

Section 15.

. . . . .

(4) *Forfeiture of pension upon misconduct.* — In no event shall any member after final conviction of a criminal offense involving violation of the laws applicable to his office or position, be entitled to receive a retirement allowance under the provisions of section one to twenty-eight, inclusive, nor shall any beneficiary be entitled to receive any benefits under such provisions on account of such member. The said member or his beneficiary shall receive, unless otherwise prohibited by law, a return of his accumulated total deductions; provided, however, that the rate of regular interest for the purpose of calculating accumulated total deductions shall be zero.

. . . . .

CHAPTER 266. CRIMES AGAINST PROPERTY

Chapter 266: Section 18. Dwelling house; entry at night; breaking and entering in day time; weapons; punishment

Section 18. Whoever, in the night time, enters a dwelling house without breaking, or breaks and enters in the day time a building, ship or motor vehicle or vessel, with intent to commit a felony, no person lawfully therein being put in fear, shall be punished by imprisonment in the state prison for not more than ten years or by a fine of not more than five hundred dollars and imprisonment in jail for not more than two years. Whoever commits any offense described in this section while armed with a firearm, rifle, shotgun, machine gun or assault weapon shall be punished by imprisonment in the state prison for not less than five years or by imprisonment in the house of correction for not more than two and one-half years.

Chapter 266: Section 20. Stealing in building, ship or railroad car

Section 20. Whoever steals in a building, ship, vessel or railroad car shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than five hundred dollars or by imprisonment in jail for not more than two years.

Chapter 266: Section 127. Personal property; malicious or wanton injuries

Section 127. Whoever destroys or injures the personal property, dwelling house or building of another in any manner or by any means not particularly described or mentioned in this chapter shall, if such destruction or injury is wilful and malicious, be punished by imprisonment in the state prison for not more than ten years or by a fine of three thousand dollars or three times the value of the property so destroyed or injured, whichever is greater and imprisonment in jail for not more than two and one-half years; or if such destruction or injury is wanton, shall be punished by a fine of fifteen hundred dollars or three times the value of the property so destroyed or injured, whichever is greater, or by imprisonment for not more than two and one-half years; if the value of the property so destroyed or injured is not alleged to exceed two hundred and fifty dollars, the punishment shall be by a fine of three times the value of the damage or injury to such property or by imprisonment for not more than two and one-half months; provided, however, that where a fine is levied pursuant to the value of the property destroyed or injured, the court shall, after conviction, conduct an evidentiary hearing to ascertain the value of the property so destroyed or injured. The words "personal property", as used in this section, shall also include electronically processed or stored data, either tangible or intangible, and data while in transit.